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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.D., a Person Coming Under the
Juvenile Court Law.

B209770
(Los Angeles County
Super. Ct. No. CK70005)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.D.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County.
Sherri Sobel, Juvenile Court Referee. Affirmed.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and
Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County
Counsel, R. Keith Davis, Deputy County Counsel, for Plaintiff and Respondent.

This dependency appeal is from an order terminating parental rights (Welf. & Inst. Code, § 366.26),¹ after the child A.D. (born Sept. 2007) was born with cocaine toxicity. Appellant mother L.D. was found to endanger the child's physical and emotional health and unable to adequately provide for the child's ongoing care and supervision because of mother's history of cocaine and methamphetamine use, bipolar and paranoid mental state, and noncompliance with her psychotropic medications.

Mother properly contends that holding the jurisdiction and disposition hearing in the incarcerated mother's absence was statutory error because she did not waive her presence, but the error was under the circumstances harmless and does not require reversal. The contention that the juvenile court failed to ensure compliance with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.; hereinafter, ICWA), is unavailing because no ICWA notice was required where, as here, the mother and the child failed to meet the tribe's Native American blood quantum level requirement.

FACTUAL AND PROCEDURAL SUMMARY

Mother, herself a former dependent of the Los Angeles County juvenile court with Pima Indian heritage, had two children removed from her custody by two different child protective agencies. Santa Barbara County child welfare authorities removed her son, with whom mother did not reunify and who is awaiting adoption; the son's removal was due to mother's erratic, violent, and dangerous behavior. The Los Angeles Department of Children and Family Services (DCFS) removed mother's other child, the daughter who is the subject of the present appeal, due to mother's substance abuse and mental health problems.

The child was born prematurely, and mother received no prenatal care. Soon after the child's removal, mother was incarcerated throughout most of this case and either in jail, a jail psychiatric unit, or in a state mental hospital. Hospital staff observed mother screaming, swearing, verbally abusive, and exhibiting paranoid ideation and tangential

¹ Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

thinking. At the hospital, mother acknowledged to a DCFS social worker that she was receiving Supplemental Social Security (SSI) for a mental disability, admitted prior psychiatric hospitalizations, and interacted inappropriately when the child was brought to her. Mother asserted her positive drug tests were due to contamination caused by her proximity to people who may have been using cocaine, denied having a substance abuse problem, and stated she did not know who was the child's father and was not interested in finding out or providing leads to DCFS.²

While the child was still hospitalized, mother left the hospital against medical advice and told the nursing staff she was going to "hang out" with friends at an unspecified library. Then, mother's whereabouts were unknown and she could not be contacted. At the detention hearing on September 19, 2007, mother was not present and was not represented by counsel; she was not given notice of the detention hearing because her whereabouts were unknown. The court directed DCFS to initiate a search for her and noted that mother, now an adult, had herself been a dependent of the juvenile court, and had a history of drug abuse and emotional problems.

For the jurisdiction and disposition hearing on October 18, 2007, the report by DCFS listed mother's criminal arrests and convictions and indicated she had been convicted of possession of a controlled substance in June of 2007. The report described mother as homeless and an IV drug user and noted mother's lack of prenatal care, substance abuse history, positive drug tests, and her self-admitted use of cocaine and methamphetamine during her pregnancy.

Approximately a week before the jurisdiction and disposition hearing, DCFS located and interviewed mother who was in custody at the Century Regional Detention Facility in Lynwood. When mother told the social worker she wanted an attorney, the social worker advised her that one would be assigned to her when she came to court.

² Subsequently, DCFS pursued information that led to a person who was possibly the father, but he did not comply with a court ordered DNA paternity test, did not attend the hearing to terminate parental rights, and did not appeal any court orders.

Mother denied using cocaine while she was pregnant and claimed she was in proximity to someone who was “smoking something.” During the interview, mother indicated that she had smoked crack cocaine because of the people in her head (radio voices), and that she should be in rehabilitation because the people in her head needed rehabilitation. She blamed the voices in her head for making her smoke crack cocaine, and admitted smoking marijuana because she wanted to be a “stoner.”

When the social worker asked about her mental health, mother admitted she was bipolar and had been hospitalized at Metropolitan State Hospital when she was 17 years old, and that she was incarcerated for possession of cocaine. The prescribed medications mother had taken (Zoloft, Depakote, Ambien, Serequel, and Haldol) for bipolar disorder, paranoid ideation, and hallucinations did not help her, in part, because she was not compliant with the medications. Mother was unable to focus on subjects or judge their importance. Her parents had histories of mental disorders, her grandparents were alcoholics, and mother was homeless.

DCFS found that mother had no reasonable plan to provide for the child’s necessities, and that mother’s current substance abuse and mental illness seriously impaired her ability to supervise, protect, or care for her daughter. DCFS recommended no reunification services for mother, based on her inability to reunify with her older child, her long history of drug abuse, and her untreated mental health needs.

At the October 18, 2007, jurisdiction and disposition hearing, mother was not present, and she was not represented by counsel. The juvenile court found that notice to her was proper by “personal service.” The court found that the child was “born under the influence,” that mother had a “history of substance abuse,” that she had suffered from mental and emotional problems including a bipolar disorder and paranoid ideation, and that she had “not been in treatment nor was she compliant with psychotropic medication.” The court declared the child to be a dependent pursuant to section 300, subdivision (b), sustained the dependency petition as alleged, and found by clear and convincing evidence that returning the child to her would create a substantial risk of danger to the physical or emotional well being of the child.

The juvenile court also denied mother reunification services under section 361.5, subdivisions (b)(10) and (13); i.e., mother's failure to have unified with a sibling (the child's brother in the Santa Barbara case), and mother's history of chronic drug use and resistance to prior court-ordered treatment. The court indicated it could not find by clear and convincing evidence that it would be in the child's best interest to offer any reunification services. The court set February 14, 2008, as the date for a permanency planning hearing pursuant to section 366.26, and directed that mother be given notice of writ procedures at her last known address. The juvenile court sent notice of her rights to her address at the detention facility in Lynwood.

The DCFS report prepared for the February 14, 2008, section 366.26 hearing indicated that mother was incarcerated at the Twin Towers facility. On November 28, 2007, mother was personally served at the Twin Towers with notice of the hearing. However, mother was not present in court on that February 14, 2008, hearing date. The court found that notice to mother was proper, but notice was not proper as to the alleged father, and the court continued the matter.

According to the DCFS report submitted for the May 15, 2008, continued section 366.26 hearing, mother was at Metropolitan State Hospital after a stay at the Twin Towers psychiatric unit. On April 21, 2008, someone from the Metropolitan State Hospital left a message for the DCFS social worker indicating that mother was at that state hospital, had received notice paperwork, and was in custody on a forensic hold but wanted to attend the court hearing. DCFS submitted the paperwork for mother to be transported on April 21, 2008, but she was not present at the hearing. The hearing was continued, and the court ordered that mother be transported to court for the next hearing.

Mother appeared in this case for the first time at the July 15, 2008, continued section 366.26 hearing, and counsel appeared on her behalf. At this hearing the juvenile court repeatedly observed, as it had at previous court sessions as well, that this was an Indian heritage case and not an ICWA case because mother did not satisfy the requisite Native American blood quantum level. Nonetheless, the court had at the outset (at the detention hearing) requested that DCFS give notice to the Pima tribe in Arizona to

confirm that there had been no change in its tribal blood qualifications. The Pima tribe sent a letter indicating that the child was not an Indian and not eligible for enrollment in the tribe, and the court concluded that “the blood line ran out with [mother] . . . the blood quantum was not enough for [mother] herself and not enough for the baby. . . . So this is a non-ICWA case, which we know.”³

Also at this July 15, 2008, continued section 366.26 hearing, mother told the juvenile court that she had not attended earlier court hearings because “they didn’t let me go.” Her counsel requested a continuance to “review the legal file,” and noted that while mother was in custody she had repeatedly requested to be transported for the court hearings but “they refused to transport her.” In response to counsel’s request for a continuance, the court stated: “You’re entitled to your 10 days because the report came in today so you’re absolutely entitled to your 10 days and I’ll give you your 10 days for a contest[ed hearing]. And you need to do whatever it is you need to do.” Mother repeated, “They didn’t let me go to court.” The court, replied, “[T]hat’s between you and your counsel to establish what happened or didn’t happen regarding your child over the last several months.” The matter was then continued.

On July 25, 2008, mother appeared with counsel at the final section 366.26 hearing. Her counsel objected to proceeding with the hearing on the grounds that mother had not been given proper notice of the disposition orders. Counsel stated that mother had been incarcerated since September and that her first appearance had been on July 15. After the court denied the request to continue the section 366.26 hearing and asked if there was anything further, mother commented that “They wouldn’t let me go.” The court replied, “We’ve discussed this already,” and asked if there was anything else to add.

Mother’s counsel then argued that mother would be released soon and could take her prescription medication. The court responded that the only issue at the section 366.26

³ We note that there is no evidence in the record, nor any assertion anywhere, that the possible father has any Indian blood line.

hearing “without the filing of a [section] 388 [petition], which I do not have, is the current relationship of [mother] with her child. Do you have anything on that today?” Counsel replied that she did not, but then requested a continuance of the hearing because mother had been incarcerated and was only brought to court two weeks ago. Mother again protested that “They wouldn’t let me come to court.” The court denied the request for a continuance and terminated parental rights.

This appeal ensued.

DISCUSSION

I. Incarcerated mother’s absence at the jurisdiction and disposition hearing was contrary to Penal Code section 2625, but was harmless error.

On October 18, 2007, at the jurisdiction and disposition hearing, the child was adjudged a dependent child under section 300, subdivision (b), and mother was not present at that hearing nor represented by counsel. Although the record is unclear as to the exact time periods when mother was either at the Lynwood Detention Facility, the Metropolitan State Hospital, or the Twin Towers jail, mother’s trial counsel represented that she had been in county custody since September 30, 2007. Similarly, DCFS indicated that mother had been in a locked hospital facility and/or a locked incarceration facility since September of 2007.

At that October 18, 2007, jurisdiction and disposition hearing, the court found true the allegations in the dependency petition, took jurisdiction over the child, ordered her removed from mother, denied reunification services, and set the matter for a section 366.26 hearing. On July 15, 2008, at the section 366.26 hearing, mother and her counsel appeared for the first time in this dependency matter.

Penal Code section 2625 applies to persons in a county jail or in a state mental hospital if in custody (Pen. Code, § 2625, subd. (a)) and sets forth the statutory right of an incarcerated parent to be present at a hearing to adjudicate whether the parent’s child is a dependent of the court under various provisions of section 300. (*In re Jesusa V.* (2004) 32 Cal.4th 588.) “[B]oth the prisoner *and* the prisoner’s attorney must be present before the juvenile court may adjudicate a dependency petition.” (*Id.* at p. 622.) Nonetheless,

our Supreme Court has also held that this statutory right to be present at the jurisdiction and disposition hearing is subject to a harmless error analysis. (*Id.* at pp. 622, 624, 625.) Further, finding a parent's absence not prejudicial may be warranted not only by the facts of the particular case, but is also "bolstered" by the legislatively expressed "strong countervailing interest" in resolving dependency actions expeditiously. (*Id.* at p. 625, citing § 352, subd. (a) & *In re Malinda S.* (1990) 51 Cal.3d 368, 384.)

In the present case, mother asserts she was prejudiced because if she was present and had an attorney assist her at that hearing she could have contested the jurisdiction and disposition findings and argued that she should have been afforded reunification services. However, neither in the juvenile court (by way of a section 388 petition or otherwise), nor now on appeal, does mother offer any specific suggestions as to how she could have successfully contested the jurisdiction and disposition findings.

The child tested positive for cocaine the day after her birth, mother had a history of substance abuse and was a current abuser of amphetamine and cocaine, which she used during her pregnancy and for which she tested positive at the child's birth. Mother suffered from serious mental and emotional problems. There was abundant and unambiguous support for the finding that mother endangered the child's physical and emotional health and was unable to adequately provide for the child's ongoing care and supervision because of mother's history of cocaine and methamphetamine use, her bipolar and paranoid mental state, and noncompliance with her psychotropic medications. The jurisdictional findings were based on overwhelming and uncontroverted evidence, much of it from mother herself.

Nor could mother's presence with counsel have had any effect on the juvenile court's determination to rely on statutory provisions permitting it to bypass reunification services. The court-ordered bypass of reunification services was pursuant to section 361.5, subdivision (b)(10) (failure to reunify with a sibling and no subsequent efforts to treat problems leading to removal) and subdivision (13) (substance abuse history and failure to comply with court ordered treatment plan). Mother speculates that if she had been present at the hearing with an attorney, "she would have had the opportunity to

contest the subdivision (b)(10) and (13) allegations by showing what, *if any*, efforts she had made to treat the problems that led to removal of [the child's] sibling or to show she did not have an ongoing substance abuse problem or that she had successfully completed drug treatment.” (Italics added.)

Hence, mother merely offers general speculation without a single concrete example of what she purportedly did to ameliorate her many problems relating to parental unfitness. She offers nothing but the hint of some unarticulated efforts—“if any” efforts at all, as she admits—to rebut the DCFS recommendation against reunification services and to counter the statutory authorization for denying such services.

Mother's efforts on appeal to defeat harmless error are as inadequate as her efforts elsewhere. Mother was not prejudiced by appearing without counsel at the jurisdiction and disposition hearing, the evidence against her was overwhelming, and a different result would not have been probable had she been present with counsel. Thus, apart from whether the Penal Code section 2625 issue was waived by failure to bring it before the juvenile court by a section 388 petition or otherwise, as asserted by DCFS, the error was harmless. Returning the case to square one would not result in a different outcome and would only delay permanency for the child.

II. No reversible error as to ICWA.

Mother's opening brief urged that the juvenile court failed to ensure that DCFS complied with the ICWA notice requirements because it terminated parental rights without confirming that the required notice had been sent to the two Pima Indian tribes. Mother urges that although at the detention hearing the court ordered DCFS to send notice to the tribes, it did not ensure the notice sent was proper under state and federal ICWA requirements before finding the ICWA inapplicable at the jurisdiction and disposition hearing.

As indicated by the material of which we have taken judicial notice pursuant to the request by DCFS, relevant events occurred in the juvenile court after mother filed her opening brief herein. On November 21, 2008, and again on January 9, 2009, the juvenile court found ICWA inapplicable after considering further information from the Salt River

and Gila River Pima tribes regarding the tribes' membership requirements and their statements that the child was not eligible for membership in either tribe because she did not have the necessary Indian blood quantum.

In light of this new information, mother "acknowledges that remand on the ICWA issue for proper notice may not result in further useful information on [the child's] Indian status." We agree. Mother now requests only that this court "emphasize to the trial court the importance of ensuring proper ICWA notices procedures are followed." However, we are confident that the juvenile court is aware of its legal responsibilities and decline the invitation to render unnecessary comments.

DISPOSITION

The judgment is affirmed.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST